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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. PETER JOSPEH FARRELL, Defendant and Appellant.	C064147 (Super. Ct. No. 62-091796)

Defendant Peter Joseph Farrell was convicted by jury of felony driving under the influence of alcohol or drugs with a prior conviction for vehicular manslaughter while intoxicated. In a bench trial, the court found defendant's prior conviction for vehicular manslaughter constituted a strike offense. The trial court sentenced defendant to state prison for six years.

Defendant's ensuing appeal is subject to the principles of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106, 110. In accordance with the latter, we will provide a summary of the offenses and the proceedings in the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On July 11, 2009, California Highway Patrol (CHP) Officer Greg Moser conducted a traffic stop of a car driven by defendant for driving 20 to 25 miles per hour in a 55-mile-per-hour zone and weaving onto the right shoulder. Officer Moser noticed that defendant had red, watery eyes and slurred speech, and there was a strong odor of alcohol emanating from the car. He also noticed defendant had some dried blood on his forehead, face, and clothing. Defendant said he had been in a fight earlier with a security guard at Thunder Valley Casino. He initially denied that he had been drinking, but later admitted having had one beer.

CHP Officer Michael Terry arrived on scene to assist Officer Moser. Defendant told Officer Terry he had been in a fight with someone named Golding over some money that was owed him, and admitted having had one beer an hour earlier. At Officer Terry's request, defendant got out of the car and walked towards the sidewalk, "sway[ing] a little bit" as he walked. Officer Terry conducted several field sobriety tests and tested defendant's blood alcohol using a Preliminary Alcohol Screening (PAS) device. Defendant blew into the PAS device three times, resulting in two readable samples, 0.23 percent and 0.21 percent. Defendant was arrested for driving under the influence and driving with a blood-alcohol content of 0.08 percent or more. He was transported to county jail, where he was given the choice of submitting to either a blood test or a breath test.

He refused both. A nonconsensual blood sample was taken which showed defendant had a blood-alcohol level of 0.22 percent.

By a felony complaint deemed to be the operative information, defendant was charged with felony driving under the influence of alcohol or drugs with a prior conviction for vehicular manslaughter while intoxicated (Veh. Code, §§ 23152, subd. (a), 23550.5, subd. (b)—count one); felony driving with a blood-alcohol level of 0.08 percent or higher with a prior conviction for vehicular manslaughter while intoxicated (Veh. Code, §§ 23152, subd. (b), 23550.5, subd. (b)—count two); and misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)—count three). The information specially alleged that, as to counts one and two, defendant had a blood-alcohol content of 0.15 percent or higher (Veh. Code, § 23578); defendant had a prior serious or violent felony conviction in 1988 for vehicular manslaughter while intoxicated (Pen. Code,[1] § 192, subd. (c)(3)[2]); and defendant served a prior prison term in 2005 (*id.*, § 667.5, subd. (b)).

At trial, defendant testified that prior to the traffic stop, he had been drinking for several hours at Thunder Valley Casino. He left the casino briefly to retrieve his wallet from

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[1] Undesignated statutory references are to the Penal Code.

[2] Effective January 1, 2007, the offense formerly specified in section 192, subdivision (c)(3), vehicular manslaughter while intoxicated, was replaced by section 191.5, subdivision (b). Hereafter, all references to section 192, subdivision (c)(3) are to the former section.

his car when he was attacked and punched in the face by a man who demanded that defendant give up all of his money. Defendant and the man fought, and then defendant retreated to his car. The man banged on defendant's window, threatened to "fuck [him] up," and then started walking towards the casino. Defendant considered contacting casino security, but changed his mind when the man drove his truck into the back of defendant's car and then got out, yelling at defendant and holding something that looked like a pipe or a tire iron. Defendant testified that he drove toward the freeway and his attacker followed behind him. Defendant made a U-turn back towards the casino. The truck was still following defendant when he was stopped by CHP.

Defendant testified that he lied to CHP officers about what had taken place at the casino because he "was very traumatized and nervous, confused, and . . . under the influence of alcohol."

On November 20, 2009, a jury found defendant guilty on all counts. In a bifurcated proceeding, the court found the prior prison term allegation not true, but found that defendant's prior conviction for vehicular manslaughter without gross negligence constituted a strike within the meaning of sections 667 and 1192.7. Defendant's request to strike the prior strike was denied. (See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504.) The court sentenced defendant to six years in state prison, consisting of the upper term of three years on count one, doubled pursuant to the strike; an identical

term on count two, stayed pursuant to section 654; and 90 days in county jail on count three, to run concurrent to the six-year prison term. The court imposed a $600 restitution fine (§ 1202.4, subd. (b)) and a $600 parole revocation fine, stayed pending successful completion of parole (§ 1202.45), and awarded defendant 203 days of actual custody credits, plus 102 days of conduct credits, for a total of 305 days of presentence custody credits. Defendant filed a timely notice of appeal.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. Defendant filed a supplemental brief which contains four arguments. We address each of those arguments as follows.

DISCUSSION

I

Defendant contends "'[t]he People' improperly alleged Case No. 82804 out of Sacramento County, California, to the change [*sic*] of Penal Code 192, Manslaughter, Vehicular, while intoxicated, but without gross negligence, dated 6/13/88, had expired under 1988 law." He contends further as follows: "The prosecutor, in his pleading, used the 'language of the offense,' to make his case for a prior (1988) and different Penal Code

than was prescribed to fit the present Penal Code listed in [Vehicle Code section] 23550.5[, subdivision] (b). [Defendant] contends that the prosecutor in drawing out the 1988 conviction, did also extract the laws of the time which are hopelessly bound to it. The Placer County Court has allowed the prosecutor to use a 'time barred' prior conviction, strip away the laws of the time, affix a plausible and different Penal Code Number and dress it up in today's laws." Defendant "call[s] the Court's attention to clear 14th Amendment violation of 'Equal protection of the laws?'" and argues that the "'Ex Post Facto Clause' . . . prohibits retroactive application to [defendant] of a statute or statutory amendment which enlarges the elements of the offense making criminal conduct that was encompassed within the statutory definition of the current offense at the time of [defendant's] conduct[,] lessons [*sic*] the [P]eople[']s burden of proof, or increases the penalty over that in effect at the time of the crime."

Defendant's claim is confusing and at times unintelligible. To the extent he argues that use of his 1988 vehicular manslaughter conviction to double his sentence as a prior strike is prohibited by the ex post facto clause of the California and United States Constitutions, he is wrong. The law is clear that "[u]se of a prior conviction suffered before the effective date of the three strikes law as a prior strike does not violate the prohibition in either the California or United States Constitution against ex post facto laws." (*People v. James*

(2001) 91 Cal.App.4th 1147, 1151, citing *People v. Hatcher* (1995) 33 Cal.App.4th 1526, 1527-1528; accord, *People v. Gray* (1998) 66 Cal.App.4th 973, 995.) Accordingly, defendant's ex post facto contention has no merit. Given that, we need not address his additional claim that "the information in this case was improperly alleged" because the "'charge is untimely.'"

II

Citing to the notice to appear issued by the arresting officer, a copy of which is contained in the clerk's transcript, defendant claims he "was charged with Chemical Test Refusal," and argues this "charge should be ordered stricken" from his "Motor Vehicle Record." Defendant's claim is not cognizable on appeal.

III

Defendant contends the trial court "states as 'factual evidence' that a 'Donald Hulsey was killed'" and "the state did not meet the burden of proof, beyond a reasonable doubt on that allegation and would compel the respondent court to do so." Defendant notes that he "petitioned the court to procure the record of this conviction, the documents the District Attorney requested post conviction [*sic*] and before sentencing and did not include in the Clerk's Transcript[] on this Appeal, and was denied on July 30, 2010. Therefore [defendant] would conclude that the remaining documents would be outside the record and thereby not used."

Defendant's claim is confusing and unintelligible. More importantly, to avoid forfeiture of his claim, defendant had the burden to support his arguments with analysis and citation to evidence in the appellate record. (*People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1159; *People v. Sangani* (1994) 22 Cal.App.4th 1120, 1135-1136.) He did not do so.

In any event, to the extent defendant claims substantial evidence does not support the court's finding that his 1988 conviction for vehicular manslaughter without gross negligence constituted a strike within the meaning of sections 667 and 1192.7, his claim fails on the merits.

Background

The bifurcated court trial on the prior conviction and prior strike allegations commenced on November 20, 2009. To prove the prior strike conviction, the prosecution introduced the 1988 documents including an abstract of judgment, court minute orders, and an information.[3] The information showed defendant was charged in count one with violating former Penal Code section 191.5, subdivision (a)[4] by "unlawfully and feloniously, while driving a vehicle in violation of Section

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[3] The prosecution told the court at that time, "I've given the Court all the documents I have."

[4] Former section 191.5, as it applies to defendant's 1988 conviction, has been reenacted but is nearly identical to the former version. All references to section 191.5, subdivision (a) are to the former version.

23152 of the Vehicle code, kill a human being, to wit, GERALD HULSEY, without malice but with gross negligence, as a proximate result of the commission by said defendant of an unlawful act, to wit, failure to stop at red light, a violation of Vehicle Code Section 21453[, subdivision] (a)." The information alleged further that defendant had been charged in count two with violating Vehicle Code section 20001 by "willfully, unlawfully, knowingly, and feloniously, being a driver of a vehicle involved in an accident resulting in injury and death to a person other than himself, fail, refuse, and neglect to give to the injured person and to a traffic and police officer at the scene of the accident his name and address, the registration number of his vehicle, and the name of the owner of said vehicle; to exhibit his operator's license; to render reasonable assistance to the injured person; and perform the duties specified in Vehicle Code Sections 20003 and 20004 . . . ." The minute order showed that in 1988, defendant entered a plea of no contest to violation of Penal Code section 192, subdivision (c)(3), the lesser included but reasonably related offense of vehicular manslaughter, a felony, and to violation of Vehicle Code section 20001, felony hit-and-run. The abstract showed defendant was convicted of vehicular manslaughter without gross negligence (Pen. Code, § 192, subd. (c)(3)) and leaving the scene of an accident resulting in injury (Veh. Code, § 20001) and was sentenced to two years eight months in state prison. The court ruled on the prior prison term allegation, but took under submission the prior strike allegation and continued the trial.

At the continued bifurcated court trial on November 25, 2009, the court noted that it had "e-mail[ed] both counsel on an issue the Court saw, not necessarily on the prior convictions themselves, but more kind of on a different legal point." Reiterating its true finding as to the 1988 conviction, the court explained the issue as "whether the [section] 192[, subdivision] (c)(3) [conviction] was one that involved a situation where [defendant] personally inflicted great bodily injury or death" and invited argument from counsel as to "whether you think that the documents I have before me show that [defendant] personally inflicted great bodily injury or death, or are there probation reports to that effect that could indicate that particular finding . . . ?"

The prosecution argued that the documentation previously submitted to prove the prior conviction sufficed to support a finding of personal infliction of great bodily injury or death, noting that defendant pleaded no contest in 1988 to what was then section 192, subdivision (c)(3), the equivalent of pleading no contest to section 191.5, subdivision (b) today. The prosecution argued that, given defendant's no contest plea to running a red light and, in doing so, being involved in an accident resulting in injury or death to a person other than himself, it was clear that defendant's offense involved great bodily injury or death.

Defense counsel argued that, without a factual basis for the plea or the change of plea transcript regarding the change

of plea from vehicular manslaughter with gross negligence to vehicular manslaughter without gross negligence, the documentation was insufficient to prove beyond a reasonable doubt that defendant personally inflicted great bodily injury or death to the victim.

Before the court continued the matter for sentencing and "a final ruling . . . as to whether or not the manslaughter conviction is or is not a strike," defense counsel argued the court could "look at the entire record of the conviction but no further," to which the prosecution responded that the record of conviction "is a term of art, which does include the change of plea transcript."

The continued proceeding commenced on January 8, 2010. The court reiterated its earlier true finding as to defendant's 1988 conviction for vehicular manslaughter without gross negligence. On the issue of whether the 1988 conviction constituted a strike, the prosecution presented additional documentation ("Exhibit 12"), which included transcripts of the change of plea hearing and judgment and sentencing. The factual basis contained in the change of plea transcript stated, in relevant part, as follows: "On December 31st, 1987, . . . [defendant], while driving a vehicle, was later found to be under the influence, and the evidence will show that he was in fact under the influence at the time of the collision . . . . [Defendant] ran a red light [and] collided with a motorcyclist. The driver of that motorcycle was one Darold Hulsey, H-u-l-s-e-y. As a

consequence of that collision, Mr. Hulsey was caused to be knocked off the motorcycle and caused to be airborne, hit a concrete divider, and was instantly killed at that time. [¶] . . . [¶] After the collision [defendant] proceeded through the intersection at a fast rate of speed and went to his grandparents' residence, which was located approximately somewhere between a quarter of a mile to a half-mile, did not advise the authorities of the accident, and it was only after the CHP located the vehicle that [defendant] gave an indication as to what had happened. [¶] . . . [¶] [Defendant's] blood alcohol at the time of the test at 9:26 p.m., almost four hours after the accident, was [0].19 [percent]. [¶] The People's evidence would have established that, based on hypothetical questions which were asked at the preliminary hearing, a criminalist would testify that, assuming various factors which are present in the case, that [defendant] would have been somewhere between anywhere from a [0].22 to a [0].29 [percent] at the time of the collision." The transcript also stated that, when the court inquired of then-defense counsel whether she or her client wished to add anything to the factual basis, counsel replied, "Not at this time."

Defense counsel objected to "the opening of the evidence and the district attorney seeking to submit additional evidence to the Court as both sides have rested and argument had begun on this case," and on the ground that the documents constituted late discovery not disclosed prior to trial. She objected to

the sentencing transcript not being a part of the "record of conviction," but conceded that "the change of plea transcript would be considered part of the record of conviction." The prosecution agreed to remove the transcript of judgment and sentencing from the packet.

Over defendant's objection, the court permitted the prosecution "to reopen" and admitted Exhibit 12 minus the judgment and sentencing transcript. The court found, beyond a reasonable doubt, that defendant, in committing vehicular manslaughter without gross negligence, "did personally inflict a great bodily injury upon the victim, that [defendant] was, in fact, a driver of a vehicle who ran a red light, hitting a motorcyclist, causing a collision, and the motorcyclist was killed instantly. [¶] And because therefore [defendant] committed great bodily injury, this conviction would fall within the Three Strikes section of Penal Code Section[s] 667 [and] 1192.7 and would be a strike."

Analysis

Section 667, subdivision (d) provides, in pertinent part, that, "for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: [¶] (1) . . . any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." Section 1192.7, subdivision (c)(8) provides, in relevant part, that "'serious felony' means any of the following: [¶] . . . (8) any felony in which the

defendant personally inflicts great bodily injury on any person, other than an accomplice . . . .”

Under the foregoing provisions, a violation of section 191.5, subdivision (b) (formerly § 192, subd. (c)(3); see fn. 2, *ante*) qualifies as a serious felony when the record shows that the defendant personally inflicted great bodily injury on a person other than an accomplice (§§ 667, subd. (b), 1192.7, subd. (c)(8); see *People v. Valenzuela* (2010) 191 Cal.App.4th 316. It has been held that “the element of ‘serious bodily injury,’ as required for felony battery, is essentially equivalent to or synonymous with ‘great bodily injury’ for the purpose of a ‘serious felony’ sentence enhancement pursuant to Penal Code sections 667, subdivisions (a) and (d), and 1192.7, subdivision (c)(8).” (*People v. Moore* (1992) 10 Cal.App.4th 1868, 1871.)

In order to qualify as a strike, defendant must have “personally inflict[ed]” great bodily injury. This element requires that a defendant must “actually” and “directly perform the act that causes the physical injury to the victim.” (*People v. Cole* (1982) 31 Cal.3d 568, 572, 579.) The injury-producing act must be done by the defendant “himself,” and not by someone who merely “aided or abetted the actor directly inflicting the injury.” (*Id.* at p. 572; see also *id.* at p. 575, fn. 4.)

“In *People v. Guerrero* (1988) 44 Cal.3d 343, the Supreme Court concluded that a ‘court may look to the entire record of the conviction’ to determine the nature of a prior conviction

allegation . . . .' ([*Id.* at] p. 352.) A reporter's transcript of a plea is considered part of the 'record of conviction' as that phrase was used in *Guerrero*." (*People v. Sohal* (1997) 53 Cal.App.4th 911, 915.)

In this case, the record suffices to prove that defendant's prior conviction constituted a strike. The transcript of the change of plea hearing establishes that defendant pleaded no contest to vehicular manslaughter without gross negligence, which resulted from running a red light and hitting and causing the death of a motorcyclist. By virtue of that plea, defendant admitted that he ran the red light. From that we infer defendant was driving the car. He also admitted he hit the victim, a motorcyclist, not an aider or an abettor or a passenger in defendant's car, resulting in great bodily injury (i.e., death).

Based on the foregoing, the trial court correctly found that defendant's prior conviction for vehicular manslaughter without gross negligence constituted a strike.

IV

Defendant contends his due process rights were violated when, despite his trial attorney's objection, "the prosecutor rested his case at the conclusion of trial and then made a subsequent request to the county of prior conviction for documents as evidence, post conviction [*sic*] which were not previously made available to the defense per [section] 1054.7

. . . ." He urges us to reverse the court's finding that the 1988 conviction constituted a strike. We will not.

By virtue of the felony complaint deemed to be the information, defendant had notice at the inception of the case of the special allegation of a prior serious or violent felony arising out of his 1988 conviction. At the conclusion of the jury trial and entry of the jury's verdict on counts one through three, the court conducted a bifurcated trial with respect to the prior strike allegation.

To prove the prior strike allegation, the People submitted a packet of documentation, a so-called section 969b packet, which included an abstract of judgment, court minute orders, and an information, all related to the 1988 offense. The trial court found, beyond a reasonable doubt, that by entering a plea of no contest, defendant was in fact convicted on May 11, 1988, of vehicular manslaughter without gross negligence. The People argued that the documents in the section 969b packet sufficed to support a finding that the 1988 conviction was a serious felony and therefore a strike. Given that those documents show defendant entered a no contest plea to running a red light, and he also entered a no contest plea that, in running the red light, he was involved in an accident which resulted in the death of a person other than himself, we agree. Thus, any error in admitting the change of plea transcript (a document which defendant conceded could be considered by the court as a part of

the record of conviction) as additional evidence that the 1988 prior conviction involved great bodily injury was harmless.

V

We note an error in the abstract of judgment. Defendant was convicted by a jury of violations of Vehicle Code sections 23152, subdivision (a) (count one) and 23152, subdivision (b) (count two), with a prior conviction for vehicular manslaughter while intoxicated (Veh. Code, § 23550.5). The abstract erroneously indicates at item 1 that these convictions were based on pleas.

Having undertaken an examination of the entire record, we do not find any arguable error that would result in a disposition that is more favorable to defendant.

DISPOSITION

The judgment is affirmed.[5] The trial court shall prepare a corrected abstract that reflects defendant's convictions by jury trial rather than pleas. A certified copy of the corrected

[5] The recent amendments to section 4019 do not provide defendant with additional presentence custody credit as he has a prior serious felony. (§§ 1192.7, subd. (c)(8), 4019, former subds. (b)(2) & (c)(2) [as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50], 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

abstract shall be forwarded to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MAURO, J.